CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1928

No. 84[redacted] 94

GEORGE VAN CAMP & SONS COMPANY

vs.

AMERICAN CAN COMPANY AND THE VAN CAMP PACKING COMPANY, INC.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FILED MARCH 14, 1929

(33,298)

(33,298)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 846

GEORGE VAN CAMP & SONS COMPANY

vs.

AMERICAN CAN COMPANY AND THE VAN CAMP PACKING COMPANY, INC.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 29, 1928

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TUESDAY, FEBRUARY 21, 1928

Before Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge.

No. 3948

GEORGE VAN CAMP & SONS COMPANY

vs.

AMERICAN CAN COMPANY AND THE VAN CAMP PACKING COMPANY, INC.

Appeal from the District Court of the United States for the District of Indiana

STATEMENT OF CASE

On this appeal certain questions of law have arisen concerning which this Court is in doubt, and desires the advice of the Supreme Court.

The relevant facts out of which the legal questions grow are:

Appellant, George Van Camp & Sons Company, filed its bill of complaint in the United States District Court for the District of Indiana, charging appellees with price discrimination, in violation of section 2, chapter 323, of an Act of Congress of October 15, 1914, the so-called "Clayton Act" (United States Code, Title 15, Section 13), and seeking injunction against continuance thereof and other relief.

The bill charges that appellant, George Van Camp & Sons Company, is engaged, interstate, in the business of packing and selling food products in tin cans, and that appellee Van Camp Packing Company is engaged in the same business, and is a competitor of appellant; and that appellee American Can Company manufactures, in very great quantities, and sells, interstate, to food packers, tin cans used in the food packing industry, and owns the monopoly for certain

machines which are necessary for sealing the cans of its manufacture, and that it sells such cans in large quantities to appellant and to appellee Van Camp Packing Company, and leases to them its machines for sealing these cans;

That the American Can Company is unlawfully discriminating between different purchasers of its commodities, in that the price at which it offered and offers and sold and sells its said cans to appellee Van Camp Packing Company is 20% below its publicly announced standard prices and the prices at which it contracted to sell and did and does sell its cans of the same kind to appellant, George Van Camp & Sons Company; that the American Can Company furnishes food packers, including appellant, its machines necessary for sealing its said cans at a fixed rental, and furnishes the same machines to the Van Camp Packing Company free of charge; that the American Can Company paid and pays the Van Camp Packing Company large sums of money by way of bonus, discounts, and reductions from the price of cans fixed in contracts between them, none of such bonus, discounts, or reductions being allowed or paid to appellant; and that these discriminations were and are not made on account of differences in grade, quality, or quantity of the commodity sold, nor of the machines leased, nor on account of any difference in the cost of selling or transportation, nor made in good faith to meet competition;

That the effect of such discrimination is to substantially lessen competition, and tends to create a monopoly in the line of interstate commerce in which the appellant, George Van Camp & Sons Company, and the appellee Van Camp Packing Company are both engaged, namely, the packing and selling of food products in tin cans.

There is no allegation in the bill that the discriminations complained of tended to create a monopoly or substantially lessen competition in the line of commerce in which the appellee American Can Company is engaged.

On separate motions of the several appellees on the ground that said section 2 of the "Clayton Act" is addressed only to discriminations in price the effect of which may be to substantially lessen competition, or tend to create a monopoly in the business in which the discriminator is

engaged, the District Court dismissed the bill for want of equity, and the appeal is from the decree of dismissal.

Questions Certified

The questions concerning which this Court desires advice are:

Question 1. Does section 2 of the "Clayton Act" (United States Code, Title 15, Section 13) have application to cases of price discrimination, the effect of which may be to substantially lessen competition, or tend to create a monopoly, not in the line of commerce wherein the discriminator is engaged, but in the line of commerce in which the vendee of the discriminator is engaged?

Question 2. Where one who makes an article and sells it, interstate, to persons engaged, interstate, in a line of commerce different from that of the maker, discriminates in price between such buyers (said discrimination not being made on account of differences in the grade, quality or quantity of the commodity sold, nor being made as only due allowance for the difference in the cost of selling or transportation, nor being made in good faith to meet competition) and the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in the line of commerce wherein the buyers are engaged, does the maker and seller of the article, making such price discrimination, transgress section 2 of the "Clayton Act" (United States Code, Title 15, Section 13)?

The clerk of this Court is directed to transmit a certified copy hereof to the Supreme Court.

Clerk's Certificate

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 3, inclusive, contain a true copy of the Statement of facts and questions certified to the Supreme Court of the United States, pursuant to order of this

court entered on February 21, 1928, in the case of George Van Camp & Sons Company vs. American Can Company and The Van Camp Packing Company, Inc., No. 3948, October Term, 1927, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 23rd day of February, A. D. 1928.

Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.
(Seal United States Circuit Court of Appeals, Seventh Circuit.)

Endorsed on cover: File No. 33,298. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 846. George Van Camp & Sons Company vs. American Can Company and The Van Camp Packing Company, Inc. (Certificate.) Filed March 16th, 1928. File No. 33,298.

FILED
JUL 16 1928
CHARLES ELMORE CROPLEY
CLERK

No. 33,298

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. [redacted] 94

GEORGE VAN CAMP & SONS COMPANY,
Appellant,

vs.

AMERICAN CAN COMPANY AND
THE VAN CAMP PACKING COMPANY, INC.,
Appellees.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLANT.

FREDERICK E. MATSON,
SOLON J. CARTER,
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Attorneys for Appellant.

E. A. HARDIN PRINT, INDIANAPOLIS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

GEORGE VAN CAMP & SONS COMPANY, *Appellant*, vs. AMERICAN CAN COMPANY AND VAN CAMP PACKING COMPANY, INC., *Appellees*.	No. 846.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLANT.

THE OPINIONS IN THE COURT BELOW.

This case was decided by the District Court of the United States for the District of Indiana without opinion. The Circuit Court of Appeals for the Seventh Circuit wrote no opinion in the case, but wrote the Statement of Case and Questions Certified, which appear herein (*infra* pages 2-6 incl.)

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this court is invoked by the certificate of the United States Circuit Court of Appeals for the Seventh Circuit that it desires instructions upon the two questions of law stated in its certificate. This procedure is authorized by Section 239 of the Judicial Code (U. S. Code, Title 28, Section 346).*

CONCISE STATEMENT OF CASE.

For the convenience of the court, we set out in full the Statement of Case, Questions Certified and Clerk's Certificate as they appear in the Certificate from the Circuit Court of Appeals for the Seventh Circuit in this case.

"STATEMENT OF CASE.

"On this appeal certain questions of law have arisen concerning which this court is in doubt, and desires the advice of the Supreme Court.

The relevant facts out of which the legal questions grow are:

Appellant, George Van Camp & Sons Company, filed its bill of complaint in the United States District Court for the District of Indiana, charging appellees with price discrimination, in violation of section 2, chapter 323, of an Act of Congress of October 15, 1914, the so-called "Clayton Act" (United States Code, Title 15, Section 13), and seeking injunction against continuance thereof and other relief.

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* See Appendix A for text of section.

The bill charges that appellant, George Van Camp & Sons Company, is engaged, interstate, in the business of packing and selling food products in tin cans, and that appellee Van Camp Packing Company is engaged in the same business, and is a competitor of appellant; and that appellee American Can Company manufactures, in very great quantities, and sells, interstate, to food packers, tin cans used in the food packing industry, and owns the monopoly for certain machines which are necessary for sealing the cans of its manufacture, and that it sells such cans in large quantities to appellant and to appellee Van Camp Packing Company, and leases to them its machines for sealing these cans;

That the American Can Company is unlawfully discriminating between different purchasers of its commodities, in that the price at which it offered and offers and sold and sells its said cans to appellee Van Camp Packing Company is 20 per cent. below its publicly announced standard prices and the prices at which it contracted to sell and did and does sell its cans of the same kind to appellant, George Van Camp & Sons Company; that the American Can Company furnishes food packers, including appellant, its machines necessary for sealing its said cans at a fixed rental, and furnishes the same machines to the Van Camp Packing Company free of charge; that the American Can Company paid and pays the Van Camp Packing Company large sums of money by way of bonus, discounts, and reductions from the price of cans fixed in contracts between them, none of such bonus, discounts, or reductions being allowed or paid to appellant; and that these discriminations were and are not made on account of differences in grade, quality, or quantity of the commodity sold, nor of the machines leased, nor on account

of any difference in the cost of selling or transportation, nor made in good faith to meet competition;

That the effect of such discrimination is to substantially lessen competition, and tends to create a monopoly in the line of interestate commerce in which the appellant, George Van Camp & Sons Company, and the appellee Van Camp Packing Company are both engaged, namely, the packing and selling of food products in tin cans.

There is no allegation in the bill that the discriminations complained of tended to create a monopoly or substantially lessen competition in the line of commerce in which the appellee American Can Company is engaged.

On separate motions of the several appellees on the ground that said section 2 of the "Clayton Act" is addressed only to discriminations in price the effect of which may be to substantially lessen competition, or tend to create a monopoly in the business in which the discriminator is engaged, the District Court dismissed the bill for want of equity, and the appeal is from the decree of dismissal.

QUESTIONS CERTIFIED.

The questions concerning which this court desires advice are:

Question 1. Does section 2 of the "Clayton Act" (United States Code, Title 15, Section 13) have application to cases of price discrimination, the effect of which may be to substantially lessen competition, or tend to create a monopoly, not in the line of commerce wherein the discriminator is engaged, but in the line

of commerce in which the vendee of the discriminator is engaged?

Question 2. Where one who makes an article and sells it, interstate, to persons engaged, interstate, in a line of commerce different from that of the maker, discriminates in price between such buyers (said discrimination not being made on account of differences in grade, quality or quantity of the commodity sold, nor being made as only due allowances for the difference in the cost of selling or transportation, nor being made in good faith to meet competition) and the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in the line of commerce wherein the buyers are engaged, does the maker and seller of the article, making such price discrimination, transgress section 2 of the "Clayton Act" (United States Code, Title 15, Section 13)?

The clerk of this court is directed to transmit a certified copy hereof to the Supreme Court.

CLERK'S CERTIFICATE.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 3, inclusive, contain a true copy of the statement of facts and questions certified to the Supreme Court of the United States, pursuant to order of this court entered on February 21, 1928, in the case of George Van Camp & Sons Company vs. American Can Company and The Van Camp Packing Company, Inc., No. 3948, October Term, 1927, as the same remains upon the files and records of the

United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 23rd day of February, A. D. 1928.

EDWARD M. HOLLOWAY, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit (Seal United States Circuit Court of Appeals, Seventh Circuit)."

ARGUMENT.

The Exact Question Before This Court.

The Circuit Court of Appeals has certified two questions, both of which depend for their answers upon the interpretation of Section 2 of the Clayton Act. This section provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competion: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." (United States Code, Title 15, Sec. 13.)

When this section is stripped of those parts not pertinent to the answering of the questions certified, it reads as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce . . . to discriminate in price between different purchasers . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: . . ."

Neither of the questions certified asks this court to determine what the term "person," as used in this section, means. Neither do they ask this court to define the term "commerce," or "discrimination," or "lessen competition," or "tend to create a monopoly." But both questions do ask this court to interpret the phrase "any line of commerce," and that is, in effect, all they ask. Thus the answers to the two questions certified will be obvious if a correct answer is given to the following question:

Do the words "any line of commerce," as used in Section 2 of the Clayton Act, include lines of interstate commerce other than that engaged in by the discriminator?

THE ONLY WORD IN SECTION 2 OF THE CLAYTON ACT WHICH MIGHT BE AMBIGUOUS IS THE WORD "ANY" IN THE PHRASE "IN ANY LINE OF COMMERCE."

An answer to the above question and to the questions certified to this Court calls for an interpretation of the words "any line of commerce," as used in this section. Interpretation of Federal statutes is the determination of the intent of Congress in enacting them. The fundamental rule of interpretation in such stat-

utes is that the intent of Congress must be determined by the words used, unless the language is ambiguous.

Minor et al. v. The Mechanics Bank, 1 Peters 46, 7 L. ed. 47;

United States v. Hill, 248 U. S. 420, 63 L. ed. 337.

This rule has been many times affirmed. In *Thompson v. United States*, 246 U. S. 547, 551, 62 L. ed. 876, 879, it is said:

> "The intention of the Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture."

In *United States v. Standard Brewery*, 251 U. S. 210, 217, 64 L. ed. 229, 234, Mr. Justice Day wrote:

> "Nothing is better settled than that, in the construction of a law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it."

Another elementary rule of interpretation is that the words used by Congress must be given their usual meaning. This rule is well expressed by Mr. Justice Daniel in the opinion in *Maillard et al. v. Lawrence*, 16 How. 251, 261, 14 L. ed. 925, 930, wherein he says:

> "The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social

> transactions; and wherever the Legislature adopts such language in order to define and promulge their action or their will, the just conclusion from such a course must be, that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designated to constitute a rule of conduct, namely: the community at large."

As a corollary to the foregoing rules of interpretation, it follows that, unless a statute is ambiguous, it is improper for a court to give it a meaning other than that commonly expressed by the words used. In *United States v. Temple*, 105 U. S. 97, 99, 26 L. ed. 967, 968, it is said:

> "Our duty is to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction, for the purpose of either limiting or extending its operation . . . When the language is plain we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision."

This rule is most emphatically expressed by Mr. Justice Swayne in the opinion in *Cherokee Tobacco v. United States*, 11 Wall. 616, 620, 20 L. Ed. 227, 229, wherein he says:

> "The language of the section is as clear and explicit as could be employed . . . There being no ambiguity, there is no room for construction. It would be out of place . . . The section must be held to mean what the language imports. When a statute is clear and im-

> perative, reasoning *ab inconvenienti* is of no avail. It is the duty of the courts to execute it . . . Further discussion of the subject is unnecessary. We think it would be like trying to prove a self-evident truth. The effort may confuse and obscure, but cannot enlighten."

Applying these rules of interpretation to the part of Section 2 of the Clayton Act in question necessitates a determination of whether the words "any line of commerce" are plain or ambiguous.

The word "commerce" as used in Section 2, is defined in Section 1* of the Act (U. S. Code, Title 15, Sec. 12) so that the words "line of commerce", as so used, have an established and definite meaning. The only part of the term that remains and that might be ambiguous is the word "any". This word certainly is not susceptible of more than one meaning or application. It is a word of inclusive nature and, as used, indicates one line of commerce indiscriminately out of all lines of commerce. The meaning of the word "any" is so well established and so generally recognized that the English language has no synonym for it. To contend that it means only "some" lines of commerce, or "particular" lines of commerce is certainly doing violence to the term used by Congress.

Another test of ambiguity is established by Mr. Justice Lamar in his opinion in *Board et al. v. Rollins*, 130 U. S. 662, 32 L. Ed. 1060, in which he holds that if the words used "convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument" they are not ambiguous. When applied to the phrase in question the absence of

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* See appendix A for text of section.

ambiguity is demonstrated. The word "any" conveys a definite meaning, it involves no absurdity nor does it contradict any other part of the statute. Mr. Justice Lamar further says that where the words of the law are not ambiguous, "*whether these terms are general or limited,*" there is no room for construction. Thus the fact that the word "any" is a broad or general term does not matter. General terms can be as plain and clear as limited terms, and are usually plainer.

THE WORD "ANY" AS USED IN SECTION 2 OF THE CLAYTON ACT IS NOT AMBIGUOUS AND SO THERE IS NO NECESSITY FOR THE COURT TO "INTERPRET" OR CONSTRUE THE PHRASE "ANY LINE OF COMMERCE" IN SECTION 2 OF THE CLAYTON ACT.

This Court has had occasion to consider other statutes using the word "any". In the case of *McMurray v. Brown*, 91 U. S. 257, 23 L. Ed. 321, the statute in question provided that a person who "by virtue of any contract with the owner" did work, could have a lien. The defense contended that a special contract was not included in "any contract". In the opinion (91 U. S. at 265) Mr. Justice Clifford said:

> "Certainly the words 'any contract' are sufficiently comprehensive to include special contracts."

Applying this decision to the present questions, it seems obvious that the words "any line of commerce" are sufficiently comprehensive to include the line of commerce in which the appellant is engaged, even though it is different from the line of commerce in

which the discriminator, the appellee Can Company, is engaged.

In the case of *Caminetti v. United States*, 242 U. S. 470, 61 L. Ed. 443, the defendant was convicted of a violation of the White Slave Traffic Act. It was contended on appeal that the Act was only intended to reach "commercialized vice", and that the facts of the case did not come within that class. The statute made it an offense knowingly to transport, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for "*any* other immoral purpose." Mr. Justice Day, in the opinion of the court (242 U. S. at 485), said:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms . . . Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion . . . There is no ambiguity in the terms of this act . . . Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them."

Again this Court has passed upon the meaning of the word "any" in the case of *Dunciger v. Cooley*, 248 U. S. 319, 326, 63 L. Ed. 266, 270, wherein Mr. Justice Van Devanter said:

> "The words 'any railroad company, express company, or other common carrier,' comprehend

> all public carriers, and the words 'or any other person' are equally broad. When combined they perfectly express a purpose to include all common carriers and all persons; and it does not detract from this view that the inclusion of railroad companies and express companies is emphasized by specially naming them. To hold that the words 'or any other person' have the same meaning as if they were, 'or any agent of a common carrier', would be not merely to depart from the primary rule that words are to be taken in their ordinary sense, but to narrow the operation of the statute to an extent that would seriously imperil the accomplishment of its purpose."

Likewise in the instant case the words "in any line of commerce" perfectly express a purpose to include all lines of commerce; and to hold that the words used have the same meaning as if they were "in such line, or lines, of commerce as are engaged in by the discriminator" would certainly depart from the primary rule. On this point see also two cases decided by this Court on April 9, 1928, not yet officially reported, *Heiner v. Tindle*, 72 L. Ed. Adv. Op. 372, 48 S. Ct. 326, and *Nigro v. United States*, 72 L. Ed. Adv. Op. 426, 48 S. Ct. 388.

The Supreme Court has interpreted the word "any", as found in the phrase "any part of commerce" in Section 2 of the Sherman Anti-trust Act in the case of *Standard Oil Co. v. United States*, 221 U. S. 1, 61, 55 L. Ed. 619, 645, saying:

> "The commerce referred to by the words 'any part' construed in the light of the manifest purpose of the statute, has both a geographical and distributive significance; that is, it includes any

> portion of the United States, and any one of the classes of things forming a part of interstate or foreign commerce."

Similarly in Section 2 of the Clayton Act the phrase "any line of commerce" is to be taken in a distributive sense as applying to lessening of competition in any commodity or class of commodities.

This Court has never discussed the meaning of Section 2 of the Clayton Act—the section here in question—but it has had before it the case of *Standard Fashion Company v. Magrane-Houston Company*, 258 U. S. 346, 66 L. Ed. 653, which case involved an application of Section 3 of the Clayton Act. Section 2 provides that it shall be unlawful to do certain things where the effect of such acts "may be to substantially lessen competition or tend to create a monopoly *in any line of commerce*." Section 3 provides that it shall be unlawful to do certain other things where the effect of such acts "may be to substantially lessen competition or tend to create a monopoly *in any line of commerce*." In speaking of Section 3, Mr. Justice Day, in the Standard Fashion case (258 U. S. at 356), said:

> "Much is said in the briefs concerning the reports of committees concerned with the enactment of this legislation, but *the words of the act are plain, and their meaning is apparent* without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports." (Italics ours.)

If the words of Section 3 are plain and not ambiguous, the same should be true of that part of Section 2 which is identical in wording with the corresponding part of Section 3.

From a consideration of that which precedes, the following conclusions are logical and inevitable:

1. The only part of Section 2 of the Clayton Act whose meaning is challenged by the questions certified is the term "any line of commerce."
2. If any ambiguity exists in said term, as used in said section, it must be in the word "any".
3. The word "any", as so used, is not ambiguous.
4. The intent of Congress in using the words "any line of commerce", must be determined from the words themselves, and recourse to any extraneous sources, such as committee reports, is improper.
5. The words "any line of commerce" must be given their usual meaning.
6. The word "any" means "one indiscriminately out of all".
7. The words "any line of commerce" mean "any one line of commerce indiscriminately out of all possible lines of commerce."
8. The words "any line of commerce", as used in the section, therefore include the line of commerce engaged in by appellant, even though it be a line of commerce other than that engaged in by the discriminator in price.
9. Both of the questions certified should be answered in the affirmative.

Without in any way receding from their belief in the correctness and completeness of the above conclusions, counsel now desire to compare them with the results that would follow if the usual methods of inter-

pretation were employed, even though the use of such methods has been declared by this Court to be improper in cases where the language of the statute is unambiguous.

BUT IF THE WORD "ANY" AS USED IN SECTION 2 OF THE CLAYTON ACT IS ASSUMED (SOLELY FOR THE PURPOSE OF ARGUMENT) TO BE AMBIGUOUS, THE ESTABLISHED RULES OF CONSTRUCTION LEAD TO THE CONCLUSION THAT IT INCLUDES OTHER LINES OF COMMERCE THAN THOSE ENGAGED IN BY THE DISCRIMINATOR.

The use of the word "any" in Section 7 of the Clayton Act shows that Congress fully understood it to mean "one indiscriminately out of all possible."

The first test to determine the meaning of the word "any" in Section 2 of the Clayton Act is to examine the use of the word "any" by Congress in other sections of the same Act. Section 2 provides that it shall be unlawful "for any person engaged in commerce, in the course of *such* commerce" to discriminate so as to lessen competition or tend to create a monopoly "in *any* line of commerce". Appellees contend, and the District Court held, that the words "in any line of commerce" meant the same as if they had read "in such line of commerce". It would seem that where Congress used the words "such" and "any" in the same sentence, they must not have intended them to have the same meaning. These words are more nearly antonyms than synonyms. If Congress intended to mean "such", why didn't it say "such"—especially when its previous correct use of the word "such" in the same

sentence proved its recognition of its existence and meaning?

There is another section of the same Act in which the same words are used in similar situations, but in such context as to make their intended meaning more obvious. Section 7 * of the Clayton Act (U. S. Code, Title 15, Section 18) provides:

> "No corporation . . . shall acquire . . . the stock . . . of another corporation, . . . where the effect of *such* acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain *such* commerce in *any* section or community, or tend to create a monopoly of *any line* of commerce.
>
> No corporation shall acquire . . . the stock . . . of two or more corporations . . . where the effect of *such* acquisition . . . may be to substantially lessen competition between *such* corporations, or *any* of them, whose stock . . . is so acquired, or to restrain *such* commerce in *any* section or community, or tend to create a monopoly of *any line* of commerce." (Italics ours).

Certainly in this section the words "such" and "any" were used with intent that they have their full usual meaning; for, if "such" is substituted for "any", the purport of the section is clearly changed. This evident knowledge of the meaning of the word "any", surely was not acquired by Congress in the interval that may have existed between the drafting of Section 2 and Section 7. The interpretation of "any line of

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* See Appendix A for full text of Section 7.

commerce" in Section 2, which is contended for by appellant, is in absolute accord with the obvious meaning of the same words as used in Section 7, and leads inevitably to the conclusion that when Congress used the word "any" in Section 2, it did not mean "such".

An interpretation of the word "any" as used in Section 2 of the Clayton Act to include lines of commerce other than those engaged in by the discriminator is in harmony with the general purpose of all the anti-trust legislation of Congress.

The second test to determine whether or not the interpretation contended for by appellant is correct is to ascertain whether or not it is in harmony with the general purpose of all anti-trust legislation. Statutes against monopolies and restraint of trade are primarily for the protection of the public. The relation which the public has to the violators of such statutes is usually that of ultimate consumer. The usual effect upon the public of such violations is an unjustifiable increase in cost to the *ultimate consumer*. However, a present existence of unjust prices is not essential to a violation. Section 2 of the Clayton Act provides that a violation exists if the effect of the discrimination *may be* to substantially lessen competition or *tend* to create a monopoly. When this provision is applied to the statement of facts certified in this case, it is plain that the injury which the public will suffer from the discrimination charged must lie in the increased price which the public, the ultimate consumers, will probably be forced to pay for food packed in tin cans, if the discrimination continues to the point of driving out of business the appellant and other competitors of appellee Van Camp

Packing Company, Inc. That such a menace is real and not imaginary is amply proven by the industrial history of this country.

Of course, before the ultimate consumer feels the evil effect of such a condition, appellant, and other food packers not parties to this action, will suffer by being driven out of business. It is this special interest which gives appellant the right, under the Clayton Act, to prosecute this action. But the fundamental purpose of the Clayton Act, and all other anti-trust legislation, is the protection of the ultimate consumer. If the discrimination charged were to run its full course, where would the public buy its tin cans? Not from the can manufacturer, for the ultimate consumers do not consume empty tin cans. They consume the contents, and the can is only a necesary container to hold and preserve the contents. Therefore the ultimate consumer would buy the cans from, and pay the enhanced price to, the Van Camp Packing Company, Inc.

Thus it is obvious that the public will be damaged just as much by a monopoly in canned goods as it would be by a monopoly in tin cans, and in the same way, that is, by an increase in the cost of canned food. It would not appear reasonable to conclude that Congress intended to protect the public only in those cases where the monopoly occurred in the can making industry, and did not intend to protect the same public from the same evil result where the monopoly occurred in the food packing industry. It was the acute realization of the interaction of modern business that caused Congress to make use of the words "in any line of commerce", and thus emphasize the fact that a discrimination in price made by a person engaged in one line of business might have the effect of creating a monopoly, or lessening

competition, in some other line of business to the injury of the public.

Freedom of competition is the object of all anti-trust laws, including the Clayton Act. Eight years after the Clayton Act became a law, this Court, in the case of *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441, 66 L. Ed. 307, decided that the Federal Trade Commission Act was intended to safeguard competition among retailers dealing in the goods of one manufacturer. In commenting upon this fact, the court (257 U. S. at 455) said:

> "From this course of conduct a court may infer, indeed, cannot escape the conclusion that competition among retail distributors is practically suppressed, for all who would deal in the company's products are constrained to sell at the suggested prices."

And at another point in the opinion (257 U. S. 454), the court said:

> "The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade *which it has been the purpose of all the anti-trust acts to maintain.*" (Italics ours).

And again in the recent case of *Federal Trade Commission v. Western Meat Company*, 272 U. S. 554, 71 L. Ed. 405, this Court, referring more specifically to Section 7 of the Clayton Act said:

> "Preservation of established competition was the great end which the Legislature sought to secure." (272 U. S. at 559).

It would not appear that Congress, in enacting anti-trust legislation, intended to prevent an injury to the public if it came directly from the act of the defendant, but intended to permit the same injury to the public if it were caused by the same act of the defendant, but reached the public through the medium of a vendee of the defendant. What difference does it make to the public whether, by violation of the Act, competition is lessened in the line of business engaged in by the American Can Company or in the line of commerce engaged in by the Van Camp Packing Company, Inc.? In any event, the freedom of competition which Congress aims to preserve, and has the power to preserve, is imperilled. If appellees' contention is adopted, any manufacturer of raw material having a monopoly on a national resource may discriminate at will between purchasers of such raw material, and ruin those discriminated against. It is inconceivable that Congress intended any such result. Thus it is evident that an affirmative answer to the questions certified would be in accordance with the general intent of Congress as expressed in all anti-trust laws.

THE OPINION IN THE CASE OF MENNEN COMPANY V. FEDERAL TRADE COMMISSION, 288 FED. 744, SHOULD NOT BE PERSUASIVE IN THIS CASE BECAUSE IT IS SUBJECT TO FOUR SERIOUS WEAKNESSES.

So far as the case of Mennen Company v. Federal Trade Commission purports to decide the meaning of the phrase "any line of commerce", it is indulging in pure obiter dictum.

Prior to this case, the term "any line of commerce" has been judicially considered only twice in reported opinions, and both times by the same court. The first decision is in the case of *Mennen Company v. Federal Trade Commission*, 288 Fed. 774, decided by the Circuit Court of Appeals for the Second Circuit, (certiorari denied, 262 U. S. 759).

The other decision was in the case of *National Biscuit Company v. Federal Trade Commission*, 299 Fed. 773, (certiorari denied, 266 U. S. 272),* wherein the same court simply followed its ruling in the Mennen case, without any independent discussion of the reasons for their interpretation. So an examination of the Mennen decision will cover the entire field of direct decision upon the matters here in controversy.

The opinion in the Mennen case, written by Judge Rogers, is directly in conflict with the interpretation herein contended for by appellant. If it were not, there would probably have been no doubt in the minds of the judges of the Circuit Court of Appeals for the Seventh Circuit and no certificate in this case. It has been appellant's contention throughout this litigation

* For a discussion and criticism of these cases, see 38 Harvard Law Review, 102-107.

that the opinion in the Mennen case is an unsound conclusion derived by faulty reasoning from false premises. If appellant's view of the Mennen case is correct, the answers to the questions certified should be affirmative; if the conclusions reached in the Mennen opinion are correct, the answers should be negative.

The Mennen Company was charged with violating Section 5 of the Federal Trade Commission Act and Section 2 of the Clayton Act. It admitted the practice charged, but denied that the practice was illegal. The practice charged, as stated in the opinion, was:

> "to allow to 'wholesalers' who purchased a fixed quantity of their products a certain rate of discounts while to the 'retailers' who purchased the same quantities it denied the discount rates allowed to the 'wholesalers'."

Discussing this practice the opinion says:

> "This does not indicate any purpose on the part of the Mennen Company to create or maintain a monopoly. The company is engaged in an entirely private business, and it has a right freely to exercise its own independent discretion as to whether it will sell to 'wholesalers' only or whether it will sell to both 'wholesalers' and 'retailers', and if it decides to sell to both it has a right to determine whether or not it will sell to the 'retailers' on the same terms it sells to the 'wholesalers'. It may announce in advance the circumstances, that is the terms, under which it will sell or refuse to sell."

After discussing some decisions, the court says:

> "In accordance with these opinions we have no doubt that the Mennen Company had the right to refuse to sell to retailers at all, and if

> it chose to sell to them that it had the right to fix the price at which it would sell to them, and that it was under no obligation to sell to them at the same price it sold to the wholesalers. *It did not discriminate* as between retailers, but sold to all retailers on one and the same scale of prices. And *it did not discriminate* as between wholesalers, but sold to all wholesalers on one and the same scale of prices. There is nothing unfair in declining to sell to retailers on the same scale of prices that it sold to wholesalers, even though the retailers bought or sought to buy the same quantity the wholesalers bought." (See 288 Fed. at 781; italics ours.)

And in conclusion the court says:

> "That the Mennen Company is not shown to have practiced 'unfair methods of competition in commerce'." (288 Fed. at 782).

From the above it is clear that the Mennen Company could not have been violating Section 2 of the Clayton Act, for there was no discrimination, and discrimination is the fundamental evil at which the section is directed. Furthermore, it is obvious that the maintenance of two price scales, one for retailers and the other for wholesalers, even though it could be called a discrimination between retailers and wholesalers, could never result in lessened competition or a monopoly "in any line of commerce", for retailers and wholesalers are not in the same "line of commerce". They are each separate "lines of commerce", and a lower price to wholesalers could never result in a monopoly in either line, so long as the members of each class, or line, were enjoying prices on an equality with all their competitors.

It thus appears that the court arrived at the right result in the Mennen case, and that part of the opinion above quoted sufficiently justifies the result reached. If the opinion had gone no farther, it would have been sound and complete. But the first criticism to which it is subject is that it went farther, much farther. It undertook to show, not only that the Mennen Company had not been guilty of a discrimination tending toward a monopoly in any line of commerce, but that even if it had, that would not have been a violation of the act. Not content with deciding the case on the facts, the court unnecessarily and unjustifiably attempted to decide what the law would be if the facts had been different. Therein lies the first obvious fault in the opinion.

The dictum in the Mennen opinion is unsound in failing to point out any ambiguity in Section 2 of the Clayton Act before resorting to committee reports in Congress to aid in "interpreting" the section.

In deciding what the law would have been if the Mennen Company had discriminated as between retailers or as between wholesalers, the court reached the conclusion that a discrimination within either class of purchasers from the manufacturer could not have constituted a violation of Section 2 of the Clayton Act, for that section did not prescribe practices by a manufacturer which lessen competition among the customers of the manufacturer. In order to arrive at such a result, in the face of the words "in any line of commerce", the court decided that Congress intended those words to mean "in such line of commerce as is engaged in by the discriminator". That conclusion, not essen-

tial to the decision in the case, is based entirely upon that court's construction of some parts of reports of Congressional committees and upon some portions of speeches in Congress. The first part of this brief quotes from a number of decisions of this Court to the effect that resort to such sources is only justifiable when it is necessary to determine the meaning of ambiguous language. The existence of this fundamental rule was apparently known by the author of the Mennen opinion, for in it is stated:

> "We have recently had occasion to point out that in the case of an ambiguous or obscure statute the intent of Congress may be gathered from statements in reports of committees having the legislation in charge in either House of Congress . . . And statements made on the floor of either House by the committee in charge of the bill in the course of its passage may in like manner be considered." (288 Fed. at 778).

But although the Second Circuit Court recognized the existence of this fundamental rule, it wholly failed to comply with it. It made no effort to indicate wherein the words of the statute were ambiguous or obscure. It did not even state that they were ambiguous or obscure. It just assumed the ambiguity and proceeded to discuss certain reports of Congressional committees. In the course of this litigation there have been briefs and oral argument in the District Court, a decision by the District Court, without opinion, and briefs and oral argument before the Circuit Court of Appeals, yet no one has, at any time, indicated any ambiguity or obscurity in the words "in any line of commerce." With the District Court of Indiana, the Circuit Court of Ap-

peals for the Second Circuit, and the able counsel for appellees in this case all unable to indicate any ambiguity in these words, appellant feels justified in the assertion that no ambiguity exists. Thus the attempt, in the Mennen opinion, to look beyond the words themselves and search in extraneous records, constitutes the second serious fault in that opinion.

The dictum in the Mennen opinion is unsound in that it is based on a partial quotation from a committee report in Congress and a full quotation of the committee report conveys an entirely different meaning from that conveyed by the portion quoted.

The Mennen opinion says:

> "It is a matter of common knowledge that prior to the enactment of the Clayton Act a practice had prevailed among large corporations of lowering the prices asked for their products in a particular locality in which their competitors were operating for the purpose of driving a rival out of business. Such lowering of prices was maintained within the particular locality while the normal or higher prices were maintained in the rest of the country; and this practice was continued until the smaller rival was driven out of business, whereupon the prices in that locality would be put back to the normal level maintained in the rest of the country. The Clayton Act was aimed at that evil. This appears from the Report of the Judiciary Committee of the House of Representatives from which we quote as follows:"

Then follow excerpts from the report and the opinion continues:

> "There is nothing in the Report of the Committee which shows that in reporting the bill the Committee had in mind anything more than the suppression of the evil above referred to." (288 Fed. at 778-779).

The first paragraph of the Committee Report that is quoted in the Mennen opinion, between the last above quotations therefrom, reads as follows:

> "Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competiton and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country . . . ."

The above appears in Miscellaneous House Reports of the 63rd Congress, Second Session, Vol. 2, No. 627, p. 8; May 6, 1914. When reference is had to the complete report, it is found that all of the paragraph was not quoted in the Mennen opinion, and that the remainder of the paragraph reads as follows:

> "This section expressly forbids discrimination in price between different dealers of commodities that are sold for use, consumption, or resale within the United States or any place within its jurisdiction, when such discrimination is made with the purpose or intent to there-

> by destroy or wrongfully injure the business of a competitor, *either of such dealer or seller.*" (Italics ours).

If the Mennen opinion had included the last sentence above, could it have drawn the inference from the Committee's Report that the *only* evil aimed at by the section (288 Fed. at p. 779) was the suppression of competition between a *seller and his competitors?* To place that sentence where it belongs in the opinion in the Mennen case would cause the entire reasoning of the opinion to collapse. This is the third grave fault in that opinion, one that might be aptly termed a "sin of omission."

The dictum in the Mennen opinion is unsound for the further reason that it attempts to interpret the phrase "in any line of commerce" by referring to a committee report made five months before that phrase became a part of Section 2 of the Clayton Bill.

Another fault exists in the Mennen opinion. The report of the Judiciary Committee of the House of Representatives, which was quoted from in the Mennen opinion, was made on May 6, 1914 (Congressional Record, Vol. 51, page 8201). At the time this report was returned, this section of the bill did not contain the words in controversy in the Mennen case, or in this case, viz: "in any line of commerce". The section was then in its original form and read as follows:

> "Section 2. That any person engaged in commerce who shall either directly or indirectly discriminate in price between different purchasers of commodities in the same or different

> sections or communities, which commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States, with the purpose or intent to thereby destroy or wrongfully injure the business of a competitor, of either such purchaser or seller, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5000.00, or by imprisonment not exceeding one year, or by both, in the discretion of the court . . ."

The report of the Judiciary Committee of the House on the bill in the above form obviously can not be the proper source for a determination of the intent of Congress in passing the bill in its final form.

The words "in any line of commerce" did not appear in Section 2 of the Clayton Bill until it was reported out of a conference between managers on the part of the House and the Senate on September 24, 1914 (Congressional Record, Vol. 51, p. 15637). So, of course, a committee report on May 6, 1914 could shed no light on the intention of Congress in using the words "in any line of commerce", which did not appear in the bill until five months thereafter. Clearly then, no confidence can be placed in the conclusions of the Mennen opinion, which are plausible only so long as the reader does not realize that it is based upon fragmentary quotations from a report that applied to a section of a bill framed in entirely different language. This situation demonstrates that an effort to "construe" an unambiguous statute for the purpose of deciding a matter not in controversy is always fraught

with disastrous consequences. In the language of Mr. Justice Swayne (11 Wall. 616, at 620):

> "The effort may confuse and obscure, but cannot enlighten."

THE HISTORY OF THE CLAYTON BILL, TOGETHER WITH THE CONFERENCE COMMITTEE REPORTS AND STATEMENTS OF THE MEMBERS OF THE CONFERENCE COMMITTEE ON THE FLOOR OF CONGRESS, SHOW THAT CONGRESS INTENDED THE WORD "ANY" TO BE USED IN ITS BROADEST SCOPE IN SECTION 2 OF THE BILL.

While appellant's position is that Section 2 of the Clayton Act is unambiguous and that no resort to the legislative history of the Act or committee reports in regard to it is proper, the confusion caused by the statements as to its legislative history in the Mennen case make it necessary for appellant to discuss that topic in order to show that when properly understood, the legislative history of the Act supports the interpretation of the phrase "any line of commerce" contended for by appellant.

The Clayton Bill (House Resolution No. 15657) was introduced into the House of Representatives of the 63rd Congress on April 14, 1914. (Congressional Record, Vol. 51, p. 6714). As originally introduced, Section 2 carried certain criminal penalties for price discrimination made "with the intent thereby to destroy or wrongfully injure the business of a competitor either of such purchaser or seller". It was immediately referred to the Judiciary Committee of the House of which Mr. Clayton was then chairman. That committee, after a hearing, reported the bill out on May 28, 1914. (Id. p. 8201). This is the report quoted

from in the Mennen opinion. After debate on the floor of the House, the bill was passed on June 5, 1914, (Id. p. 9911).

After the bill passed the House, it was immediately sent to the Senate and referred to the Judiciary Committee of the Senate on June 6, 1914, (Id. p. 9929). That committee reported the bill out on July 22, 1914. (Id. p. 12468). While pending in the Senate, Section 2 of the bill as passed by the House was entirely stricken out on motion of Senator Culbertson, Chairman of the Senate Judiciary Committee, (Id. p. 13849) for the reason, as stated by him, that the Senate had just passed the Federal Trade Commission Bill and since, under that bill, all questions affecting unfair competition were to be submitted to that commission, the general subject of price discrimination could be dealt with by that tribunal.

The Clayton Bill, with original Section 2 stricken out, passed the Senate on September 2, 1914. (Id. pp. 14609-14619). The House, on September 4, 1914, disagreed with the Senate amendments and asked for a conference (Id. p. 14718). Thereupon conference managers were appointed by both House and Senate. The managers on the part of the House were Congressmen Webb, Carlin and Floyd. (Id. p. 14737). Thereafter, on September 28, 1914, the House Conferees made a conference report in the House. (Id. p. 16264). This report is House Document No. 1168, and in it, for the first time, appeared Section 2 of the Clayton Act as finally enacted. This form of Section 2 having been agreed upon in conference, the Senate Conferees reported to the Senate on September 24, 1914. (Id. p. 15637). The Senate accepted the conference report on October 5, 1914, (Id. p. 16170) and the House

accepted it on October 8, 1914. (Id. p. 16344). The bill was signed by the President on October 16, 1914. (Id. p. 16756).

It is unnecessary to speculate as to the intention of Congress in changing the phraseology of Section 2, for it was clearly expressed by the House Conferees. In the first place, it must be remembered that Section 2, as originally drafted, was a section defining and punishing a crime, and that it applied where the act was done "with the purpose or intent to thereby destroy or wrongfully injure the business of a competitor *of either such purchaser or seller*." Here, then, was the intention of Congress in the original draft of the section. Did the changes later made result from an intention to limit the prohibitions of the section to discriminations which tended to create a monopoly only in the discriminator? The Congressional Record shows that Congress never intended to restrict the scope of the original wording; but rather that the intention was to broaden its prohibitions, but remove the criminal provisions.

The pertinent section of the Conferees' report,* as contained in Report 1168, is the statement of the managers on the part of the House, as follows:

> "The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 15657) to supplement existing laws against unlawful restraints and monopolies, and for other purposes, submit the follow-

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* The propriety of considering committee reports and statements of the conference managers is established by the decision of this court in *Duplex Press Co. v. Deering*, 254 U. S. 443, 65 L. Ed. 349.

ing detailed statement in explanation of the effect of the action agreed upon by the conference committee and submitted in the accompanying conference report as to each of the amendments of the Senate, namely:

Amendment No. 1 . . .

Amendment No. 2. This amendment is a substitute agreed upon in conference as section 2 to take the place of section 2 in the bill as passed by the House. *It eliminates the penalty of the original House bill*, but *declares the acts therein forbidden to be unlawful*. It is as follows: (here follows Section 2 of the Act as passed; italics ours). (See 63rd Congress, 2nd Session, Miscellaneous House Reports, Vol. 3, No. 1168, pp. 10-11).

On October 8, 1914, Congressmen Webb and Floyd, Conference Managers on the part of the House, explained at length to the House the purpose of the amendments. Mr. Webb said (Congressional Record, Vol. 51, p. 16273), in part:

"Now, when we assembled in conference we found our tying-clause section, section 4, and found our discriminating-in-price section, section 2, absolutely eliminated from our bill, and this was done not by the conferees, but by the Senate itself on a roll-call vote. Sections 2 and 4 were stricken out in that way.

Now, there were those who insisted that we ought to have criminal penalties attached to these two sections 2 and 4. Others, however, took the position that the sections ought to go out entirely, because we had in the meantime passed the Trade Commission bill with section 5 in it which denounced as unlawful unfair methods of competition, and that the Trade Commission could and would take up all the acts

> denounced in sections 2 and 4, and prevent their further commission. So, between those two ideas the battle raged for nearly three weeks. We finally agreed to the Senate amendments striking out the criminal penalties, but to retain sections 2 and 4 as they went from the House, with an amendment which denounced as unlawful the tying contract and the discrimination in price. But as originally drawn they were criminal sections, and section 2 made it a crime to discriminate in price for the purpose of destroying or injuring a competitor. We thought that was probably too restricted. We agreed, instead of retaining the language 'with purpose or intent thereby to destroy or wrongfully injure the business of a competitor,' and so forth, to insert this language: 'Where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce.' *We felt that that would tend to give the section more elasticity and breadth. That is the reason we accepted this amendment and forbade discriminating in price when the effect of such discrimination might be to substantially lessen competition or tend to create a monopoly.* We did the same thing with reference to Section 4, which forbade the tying contract." (Italics ours.)

Mr. Floyd dealt chiefly with the other features of the bill, but in respect to Section 2, he said (Congressional Record, Vol 51, p. 16317):

> "And since the gentleman has asked me that question, I desire to take up now briefly that part of the report covering sections 2, 3, and 7. The first relates to discriminatory contracts, the second relates to tying or exclusive contracts, and the third to holding companies. It will be observed that these sections deal with con-

> tractual relations in commercial dealings. After the penalties were stricken out, the provisions of sections 2 and 3 were modified, because as criminal sections they were drafted with all the particularity of criminal statutes, the intent and purpose being included. But that is not the rule applicable to contracts. So when we decided that the acts forbidden, instead of being made penal and criminal, should be simply condemned as unlawful, a modification was made in harmony with the principles governing the construction and interpretation of contracts."

Here is the declaration of Congress as to what the change in the language of Section 2 was intended to do. It says the amendment "eliminates the penalty of the original house bill, but declares the acts *therein forbidden* to be unlawful." So the Committee felt that the amended section still made unlawful a discrimination in price, the effect of which was "to destroy or wrongfully injure the business of a competitor, *either of such purchaser or seller.*" Certainly the Committee felt that the words "in any line of commerce" were just as broad as the words "the business of a competitor, either of such purchaser or seller," and that *the amended bill made all the acts forbidden in the original bill unlawful.* Thus it is obvious that the interpretation of the words "any line of commerce" which appellant herein contends for is fully supported by, and in conformity with, the intention of Congress as expressed in committee reports and debate.

CONCLUSION.

If the language of Section 2 of the Clayton Act is given the meaning which could ordinarily be conveyed by the words used, the questions certified must be

answered in the affirmative. Such an interpretation of the section is consistent with the use of the same words in other sections of the act, with the general purpose of all anti-trust legislation, and with the purpose of Congress as expressed by reports and debate. The only obstacle to such an interpretation grows out of the Mennen and National Biscuit opinions. In fact, there would be no question as to the correctness of an affirmative answer to the questions certified but for those decisions. Counsel for appellant feel that the opinions in those cases, in so far as they touch the questions herein involved, are unsound and entitled to no weight in the determination of this Court's answer to the questions certified.

From the basic error of assuming an ambiguity that does not exist, the opinions in those cases proceed to wander unnecessarily into the maze of Congressional committee reports, and debates, and seek to interpret the phrase "any line of commerce" in the light of a committee report made long before that phrase was placed in Section 2. These errors make it necessary for this Court to declare finally the meaning of Section 2 of the Clayton Act, and to determine whether the word "any" as used by Congress in Section 2, means "any", or means something entirely different.

It is respectfully submitted that both of the questions certified should be answered in the affirmative.

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APPENDIX A.

STATUTES REFERRED TO IN ARGUMENT.

Clayton Act, Section 1 (U. S. Code, Title 15, Sec. 12):

> Words defined.—"Antitrust laws," as used in sections 12 to 27, inclusive, of this chapter, includes sections 1 to 27, inclusive, of this chapter.
>
> "Commerce," as used in sections 12 to 27, inclusive, of this chapter, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: Provided, That nothing in the aforesaid sections contained shall apply to the Philippine Islands.
>
> The word "person" or "persons" wherever used in sections 12 to 27, inclusive, of this chapter shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. (Oct. 15, 1914, c. 323, Sec. 1, 38 Stat. 730.)

Clayton Act, Section 2 (U. S. Code, Title 15, Sec. 13):

Discrimination in price between purchasers. —It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade. (Oct. 15, 1914, c. 323, Sec. 2, 38 Stat. 730.)

Clayton Act, Section 3 (U. S. Code, Title 15, Sec. 14):

Sale, etc., on agreeent not to use goods of competitor.—It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale

within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. (Oct. 15, 1914, c. 323, Sec. 3, 38 Stat. 731).

Clayton Act, Section 4 (U. S. Code, Title 15, Sec. 15):

Suits by persons injured; amount of recovery.—Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731.)

Clayton Act, Section 7 (U. S. Code, Title 15, Sec. 18):

Acquisition by one corporation of stock of another.—No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce,

where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so

located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right legally acquired on or before October 15, 1914: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything theretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided. (Oct. 15, 1914, c. 323, Sec. 7, 38 Stat. 731.)

Clayton Act, Section 16 (U. S. Code, Title 15, Sec. 26):

Injunctive relief for private parties; exception.—Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the

anti-trust laws, including sections 13, 14, 18 and 19 of this chapter, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of chapter 1 of Title 49, TRANSPORTATION, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. (Oct. 15, 1914, c. 323, Sec. 16, 38 Stat. 737.)

Sherman Act, Sec. 2 (U. S. Code, Title 15, Sec. 2):

Monopolizing trade a misdemeanor; penalty.—Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, Sec. 2, 26 Stat. 209.)

Judicial Code, Section 239 (U. S. Code, Title 28, Sec. 346):

(Judicial Code, section 239, amended.) Certificates of questions by circuit courts of appeals and Court of Appeals of District of Columbia.—In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal. (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 239, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.)

APPENDIX B.

SECTION 2 OF CLAYTON BILL AS ORIGINALLY PROPOSED AND AS EXISTING AT THE TIME OF THE COMMITTEE REPORT REFERRED TO IN THE MENNEN CASE, AND SECTION 2 OF CLAYTON ACT AS FINALLY ENACTED, ARRANGED FOR CONVENIENCE OF COMPARISON.

Section 2 of Clayton Bill as originally proposed; and as existing at the time of the committee report referred to in the Mennen case:

"That any person engaged in commerce who shall either directly or indirectly to discriminate in price between different purchasers of commodities in the same or different sections or communities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, with the purpose or intent to thereby destroy or wrongfully injure the business of a competi-

Section 2 of Clayton Act as finally enacted:

"Discrimination in price between purchasers.—It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That

tor, of either such purchaser or seller, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both, in the discretion of the court: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of transportation: *and provided further*, that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers, except as provided in section three of this act." (Misc. House Reports, 63rd Congress, Second Session, Vol. 2, No. 627.)

nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." (U. S. Code, Title 15, Sec. 13.)

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No. 33,298.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 94.

GEORGE VAN CAMP & SONS COMPANY,
Appellant,

v.

AMERICAN CAN COMPANY AND VAN CAMP PACKING COMPANY, INC.,
Appellees.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

APPELLANT'S REPLY BRIEF.

FREDERICK E. MATSON,
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APPELLANT'S REPLY BRIEF.

ARGUMENT.

In this reply brief appellant will discuss the arguments presented by appellees in their answer brief, under the same numbered points as they appear in appellees' brief.

Point 1.

(1) Under this sub-heading, appellees insist that the phrase "any line of commerce" should not be read as if it stood separate and apart from Sec. 2, but that it should be construed in the light of the other phrases found therein. In explanation of this contention, they say at line 5, of page 3, of their brief:

> "When so read, it will be apparent that the 'line of commerce', competition in which is to be protected and monopoly in which is to be prevented, is and can only be that commerce in which 'it shall be unlawful for any person to be engaged in' and 'in the course thereof' to make the prohibited discriminations."

By this argument, appellees insist that the phrases, "in commerce", "in the course of such commerce", and "in any line of commerce", as used in Sec. 2 of the Clayton Act, mean one and the same thing. All parties agree that the word "commerce" is defined in Sec. 1 of the Act, but if Congress intended each of the above phrases to have the same meaning, why in the second phrase did it modify the word "commerce" by the word "such", and in the third phrase by the words "any line of"?

Appellees further say,

> "It is not reasonable to suppose, and Congress did not fear, that any person would go out of his way to create for the benefit of some other person a monopoly or a lessening of competition in a business in which he himself was not engaged."

That part of appellees' statement that "it is not reasonable to suppose" that any person would go out of his way to create a monopoly for the benefit of another, is a statement of appellees' opinion, and as such we cannot dispute its accuracy; but the statement that "Congress did not fear" that any person would go out of his way to create for the benefit of some other person a monopoly in a business in which he himself was not engaged, is a statement of fact which is completely disproved by the text of Sec. 2 of the Clayton Act as originally proposed, which made it unlawful to discriminate in price "with the purpose or intent to thereby destroy or wrongfully injure the business of a competitor of *either such purchaser or seller*".* (See Appellant's Brief, pages 46, 47 for full text of Sec. 2 as originally proposed.)

The implied major premise in appellees' argument is that the only motive for human action is self-interest, and from this, appellees reason that no one would go out of his way to create a monopoly for the benefit of anyone except himself. But the law many times recognizes that persons may act from motives other than self-interest and holds them liable accordingly. Since the famous case of *Pasley v. Freeman* (3 Term Reports, 51) in 1789, it has been settled that a person is liable for damages caused by his fraudulent statements even though he received no pecuniary benefit as a result thereof. Furthermore, Congress has not made the inhibitions of the Clayton Act dependent upon proof that their violation will result in actual financial benefit to the violator. It is the effect of the violator's conduct upon commerce, and not its effect upon his own pocketbook, which is the criterion established by Congress; and Congress has thus, by implication, repudi-

* All italics in quotations are ours, unless otherwise noted.

ated the implied major premise of appellees' argument.

Moreover, appellant can not see the unreasonableness, which appellees apparently perceive, if the statute be held to forbid discrimination by the American Can Company which tends to create a monopoly in canned foods in its customer, The Van Camp Packing Company, Inc. The relationship between the tin can business and the canned food business is necessarily so close that if one or more customers of the American Can Company can acquire a practical monopoly of the canned food industry, it would inevitably result in creating a practical monopoly of the tin can industry in the American Can Company. Certainly the possibility or probability of such a beneficial result to the American Can Company is not beyond the comprehension of the officers and agents of that company, and it need not be assumed to be beyond the comprehension of Congress.

On page 3 of appellees' brief, beginning at the bottom of the page, they have sought to state in their own words the meaning of Sec. 2 as applied to the questions certified in this case. In so doing they state that Sec. 2 forbids them from doing the things charged in the complaint in this action, where the effect of their acts may be to substantially lessen competition or to tend to create a monopoly "in commerce in tin cans". To arrive at this conclusion they must necessarily argue that the phrase "in commerce in tin cans" conveys the full meaning of the statutory phrase "in any line of commerce". This is clearly not argument in support of their contention, but is only an illustrative restatement of their claim that the words "any line of commerce" do not mean "any line of commerce", but that they mean only some one particular line of commerce in each particular case.

Appellees have offered no definition of the word "any" which would tend to narrow the words "any line of commerce" to one particular line. Congress has made it unlawful for appellee, in the course of its commerce in tin cans, to do certain things which affect "any" line of commerce. Not the "tin can" business alone, but "any" line of commerce is protected from appellee's unlawful conduct.

(2) Under this sub-head, beginning in the middle of page 4 of their brief, appellees undertake to sustain the construction which they assert the phrase "in any line of commerce" has when used in Sec. 2 of the Act, by assuming that phrase to have the restricted meaning for which they contend, when used in Sec. 3 of the Act. They do not cite any precedents establishing the meaning which they assert the phrase has in Sec. 3, but say the phrase must necessarily have only that limited meaning because the *other parts of the section so limit* the application of this phrase that it would be impossible to imagine a state of facts in which a violation of Sec. 3 would create a monopoly in any one except the violator. Of this argument, there are two criticisms. In the first place, the existence of a state of facts in which a violation of Sec. 3 of the Clayton Act would tend to create a monopoly or substantially lessen competition in a line of commerce other than that in which the violator is engaged, is not so impossible as appellees would have this Court believe. To make their argument more plausible, appellees stress the creation of monopoly, but ignore the alternative phrase of lessening competition, and it is entirely possible that a violation of Sec. 3 of the Act may tend to lessen competition in a line of commerce other than that in which the violator is engaged. For example, in *Q. R. S. Music Company v. Federal Trade*

Commission, 12 Fed. (2nd) 730, the Q. R. S. Company, engaged in the manufacture of music rolls, required its distributors to enter into tying contracts, and endeavored to maintain a fixed retail price. Of these practices, the Circuit Court of Appeals for the Seventh Circuit said:

> "That respondent succeeded in destroying competition among the retailers is the finding of the Commission, supported, as we believe, by the evidence."

Here was a case where a violation of Sec. 3 of the Clayton Act tended to lessen competition in a line of commerce other than that in which the violator was engaged.

In the second place, if it be conceded for the sake of argument that a violation of Sec. 3 of the Clayton Act could only create a monopoly in the violator, that could in no way aid in arriving at the correct meaning of the phrase "in any line of commerce" in Sec. 2, for the limitation upon the meaning of this phrase as used in Sec. 3 is created by the context of Sec. 3 defining tying contracts, and not by the meaning of the phrase "any line of commerce", which only describes the field in which the monopoly must take effect. No such limitation of the phrase is compelled by the context in Sec. 2.

In comparing the use of the phrase in various sections of the Clayton Act, appellees' brief is strikingly silent about the use of the phrase in Sec. 7. Even if appellees' assumptions as to the meaning of the phrase in Sec. 3 are admitted to be correct, why should its meaning in Sec. 2 be the meaning as limited by the context in Sec. 3, rather than the broad and unmis-

takable meaning in which it is used in Sec. 7? *Where a phrase is used in several sections of an Act, it is illogical to say that the section in which it is most narrowly limited by the context should be selected as the full measure of meaning which can be given to the phrase in other sections wherein such limitation by context does not exist.*

This Court has previously given consideration to an argument like that of appellees in the case of *Ex parte Grossman*, 267 U. S. 86; 69 L. Ed. 527. This was the case wherein this Court was called upon to decide whether the president was given the power to pardon criminal contempts by Article 2, Section 2, Clause 1 of the Constitution of the United States, which says " . . he shall have power to grant reprieves and pardons for offenses against the United States . . ." One argument against such power in the president (267 U. S. at 117) was to the effect that the word "offenses" was used in one other place in the Constitution and once in the Amendments; that in each of these instances the context gave the word a meaning which could not include criminal contempts; and that the word should therefore have the same narrow meaning in the clause in question. In answer thereto, this Court said:

> "We do not see how these other two uses of the word can be said to limit the meaning of 'offenses' in the pardon clause."

And, a little further on in the opinion, this Court said that it thought the arguments drawn from the common law and from the legislative history of the clause, and

"from the ordinary meaning of its words, are much more relevant and convincing."

This Court held that the word "offenses" as used in Article 2, Section 2, Clause 1 of the Constitution included criminal contempts, and that decision is a repudiation of the technique and reasoning by which appellees seek to limit the meaning of the phrase "any line of commerce" in Section 2 of the Clayton Act.

(3) Under this sub-head, the same illogical argument is used by appellees beginning at the top of page 7 of their brief. They lay down as a rule of law that "identical words in the same Act or section should receive the same construction, unless the context compels the contrary." They state that no context compels the giving of a different meaning to the word "competition" in the two different clauses wherein it occurs in Sec. 2, yet they immedately follow this statement by plainly pointing out *wherein the context* of the proviso clause of the section does give the word "competition", as there used, a limited meaning, viz., competition between the discriminator and his competitors. Then they argue that this limited meaning should be applied to the word "competition" as used in the main clause of Sec. 2, and thus seek to support their contention as to the meaning of the phrase, "in any line of commerce." While we have no quarrel with the rule of law stated by appellees, we believe that it has no such application as they seek to make. As heretofore stated, there is no reason for selecting the meaning of a word where it is most narrowly limited by the context, as the full measure of the meaning that can be given to the word in other portions of the section or act where such

limitation by context does not exist. Furthermore the entire discussion contained under this sub-head in appellee's brief is academic because the meaning of the word "competition" is not in question in this case.

(4) Under this sub-head, appellees contend that if the phrase "in any line of commerce" gives this section the meaning for which appellant contends, the phrase is wholly unnecessary and superfluous, for if it had been omitted entirely, the meaning of the language would have been as broad as that for which appellant contends. If this is true, how does the addition of the phrase narrow the meaning? No broader phrase can be imagined. Appellees, on page nine of their brief, undertake to show that the phrase is restrictive and is used only for the purpose of confining the application of the act to monopoly and lessening of competition resulting to trade in interstate and foreign commerce. This might explain the use of the phrase "in commerce", but it does not explain the use of the phrase "in *any line* of commerce." Since Congress had, in Sec. 1 of the Act, defined "commerce" as interstate or foreign commerce, why should Congress put the words "any line of" in front of the word "commerce" for this purpose?

(5) Appellees argue that this Section should not be given the meaning attributed to it by appellant because there is nothing in the Congressional Record to indicate that Congress had in mind the particular state of facts which exist in this case. This is like contending that a statute punishing murder passed in 1852 does not apply to a murder committed by throwing a person out of an aeroplane, because when the statute was passed, the Legislature did not have in mind the

possibility of such a method of killing; and is just as fallacious from a legal standpoint. The general rule of statutory construction is that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to persons, subjects and business within their general purview existing at the time of the enactments, and to *those coming into existence subsequent to their passage.*

Haselton v. Interstate Stage Lines, 82 N. H. 327, 332, 133 Atl. 451;
Commonwealth v. Quaker Cab Co., 287 Pa. 161, 166, 134 Atl. 404;
Appeal of Cummings, 126 Me. 111, 114, 136 Atl. 662.

Illustrative instances of the application of this rule by this court may be found in the following cases:

Pickhardt v. Merritt, 132 U. S. 252, 33 L. Ed. 353;
Newman v. Arthur, 109 U. S. 132, 27 L. Ed. 883;
Beard v. Rowan, 9 Pet. 301, 9 L. Ed. 135;
Adams v. Woods, 2 Cranch. 336, 2 L. Ed. 297.

Appellees, on page 11 of their brief, admit that it is the policy of the anti-trust acts to preserve freedom of competition, but assert that any restriction upon the freedom of action of persons engaged in commerce must tend, to some extent, to restrict freedom of competition. We do not believe that the anti-trust acts, as interpreted by this Court, will sustain such an asser-

tion. There is a wide distinction between the meaning of the phrases "freedom of competition" and "freedom of action of persons engaged in commerce". The theory of all anti-trust legislation has been that the United States must, for the social interest, impose certain restrictions upon the *freedom of action* of persons engaged in commerce in order to obtain *freedom of competition*, because it is common knowledge that the freedom of action of persons engaged in commerce will, and does in many instances, tend to create a monopoly. Congress has balanced the desirability, from the point of view of the social welfare, of unrestricted freedom of action of persons engaged in commerce, and freedom of competition, and has decided that the former must be subordinated to the latter. The argument advanced by appellees bears rather upon the legislative wisdom of the decision made by Congress on that point than upon the present question. This Court should not deny to Sec. 2 the meaning for which appellant contends merely because to do so might result in some further restriction upon the *freedom of action* of the appellees herein.

Point 2.

In attempting to answer the appellant's argument that the case of *Federal Trade Commission v. Beech Nut Packing Company*, 257 U. S. 441, indicated that it was the purpose of all the anti-trust acts to maintain competition not only between a seller and his competitors but between purchasers from a given seller and the latter's competitors, counsel for appellees adopt the device used in the Mennen case by the Circuit Court of Appeals for the Second Circuit, of quoting only that

part of a sentence favorable to their contention, and take the position that this Court in the Beech-Nut case was merely referring to freedom of competition "in general" as the purpose of all the anti-trust acts. They overlook the fact that the practice denounced in that case was a practice which lessened competition between the purchasers from one seller and that the Court in commenting upon it said:

> "*The system here disclosed* necessarily constitutes a scheme which restrains the flow of commerce and freedom of competition in the channels of interstate trade which it has been the purpose of *all* the anti-trust acts to maintain."

Appellant did not contend that this Court in the Beech Nut case directly held that the Clayton Act was intended to prevent acts which tend to create a monopoly among the purchasers from a violator of that Act. But this Court has never taken a position contrary to that. What appellant then and now contends is that after its enactment, the Clayton Act was one of the three anti-trust statutes passed by Congress, and when this court referred to the purpose of *all* of the anti-trust acts in its decision in the Beech Nut case, there is no reason to assume that this Court overlooked the existence of the Clayton Act or for some unknown reason arbitrarily excluded it from the general classification of anti-trust acts to which it was referring in that opinion. Appellant contends that an affirmative answer to the certified questions in this case would be in harmony with this Court's former statements as to the intent and purpose of all anti-trust legislation as stated in ***Federal Trade Commission*** *v.* ***Beech Nut Packing Company***, and other decisions.

Point 3.

Under this point in their brief appellees discuss the opinion in the case of *Mennen Company v. Federal Trade Commission*, 288 Fed. 774, and set out copious quotations therefrom. Appellees attempt to supply that which is obviously missing in the Mennen decision, viz.: some showing of ambiguity in the phrase of Sec. 2 which is here in question. However, we do not concede the right of appellees at this time to support the opinion of the Circuit Court of Appeals for the Second Circuit by reading into it appellees' supposition as to what that Court had in mind. If the Circuit Court of Appeals for the Second Circuit had appellees' "suggestion of ambiguity" in mind, or if the same had been presented to it, it evidently did not think the "suggestion" of sufficient weight to justify a discussion of it in its opinion. This "suggestion of ambiguity" is the same argument previously made by appellees and is based entirely upon the assumption that the phrase "in any line of commerce" as used in Sec. 3 is necessarily limited in its application by the context of that Section, and that, therefore, the same phrase, wherever used in the Act and regardless of context, must be given the same limited meaning. Whatever may have been in the minds of the members of the Circuit Court of Appeals for the Second Circuit when they wrote the Mennen opinion, their opinion remains defective in that it assumes an ambiguity which is not specified or indicated, and which we do not believe exists.

Beginning in the center of page 21 of their brief, appellees attempt to justify the opinion in the Mennen case with regard to the history of the change in word-

ing in the bill as originally introduced. In the second paragraph on page 22 of appellees' brief, appellees state most unfairly the argument advanced by appellant with regard to the effect of the change in the phraseology of Sec. 2 of the Clayton Act. Appellees there say:

> "In an effort to show that the eliminated phrase is synonymous with or rather is included in the substituted phrase, appellant really relies upon a statement made by congressmen during the consideration of the Bill by the House to the effect that the new language gave that section more breadth and elasticity."

As a matter of fact, appellant does not rely upon statements made by "congressmen" indiscriminately but upon statements by the House conferees in charge of the Bill. Appellant does not rely only upon the statement made by Congressman Webb that the change "would tend to give that section more elasticity and breadth." Appellant also relies (see appellant's brief, pages 32-37) upon the following facts: (a) Sec. 2 as originally drafted protected competition between a seller and his competitor and between purchasers from a seller and such purchasers' competitors. (b) Of the change in phraseology in Sec. 2, the House Conferees, in House Report No. 627, said, "It eliminates the penalty of the original House Bill, but declares the *acts therein forbidden* to be unlawful". (c) Of that change, Congressman Floyd said, "So when we decided that the *acts forbidden* instead of being made penal and criminal should be simply condemned as unlawful, a modification was made in harmony with the rules governing the con-

struction and interpretation of contracts". It was once said that Herbert Spencer's idea of a tragedy was a theory destroyed by a fact. Certainly the skilful theory, developed by counsel for appellees (pages 22-24 their brief) for the purpose of minimizing the destructive effect of the debates in Congress upon the Mennen opinion, is tragically destroyed by any impartial consideration of the actual history of the Clayton bill and the statements of the committees and congressmen in charge of it. Appellees' statement on page 23 of their brief, "In fact, in all of the discussions in both House and Senate there is no intimation that the purpose of the act was to protect competition among purchasers from the seller, or in any other business than that in which the discriminator was engaged" cannot be reconciled with the facts.

CONCLUSION.

In conclusion, we wish to direct the Court's attention to the fact that appellees make no effort whatever to answer that part of appellant's brief, (pages 17 to 19) wherein was pointed out the obvious and unambiguous meaning of the phrase "any line of commerce" as used in Sec. 7 of the Clayton Act. This is a section in which the wording is so clear that the meaning of the phrase cannot possibly be misunderstood, and cannot possibly have the meaning which appellees contend it has in Sec. 2, but must necessarily have the meaning which appellant contends it has in Sec. 2. Though the phrase is also used in Sec. 3, there is nothing in Sec. 3 which clarifies its meaning in Sec. 2. Yet appellees would explain the meaning

of the phrase in Sec. 2 only by going to Sec. 3. They entirely ignore the use of the phrase in Sec. 7, where its meaning is unmistakable and is emphasized by contrast. Appellees' failure to touch upon or discuss the meaning of the phrase in Sec. 7 is significant, and can be properly construed as a tacit admission that a comparison of Sec. 2 with Sec. 7 would support appellant's contention.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 94

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE VAN CAMP & SONS COMPANY,
Appellant,

v.

AMERICAN CAN COMPANY,
THE VAN CAMP PACKING COMPANY,
Appellees.

BRIEF OF APPELLEES.

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IN THE

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OCTOBER TERM, 1927

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE VAN CAMP & SONS COMPANY,
Appellant,

v.

AMERICAN CAN COMPANY,
THE VAN CAMP PACKING COMPANY, INC.,
Appellees.

No. 846

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

The two questions certified by the Circuit Court of Appeals are precise and comprehensive in their form, and appellant's suggested restatement is unduly abbreviated and unnecessary.

ARGUMENT.

Point I.

Section Two of the Clayton Act Refers Only to Competition Between the Person Granting the Discrimination and his Competitors and to Monopoly to be Enjoyed by the Person Granting the Discrimination.

Appellant contends that the correct answer to the certified questions turns upon the meaning of the phrase "any line of commerce" as used in Section 2 of the Clayton Act; that the word "any" obviously applies to every line of commerce; and hence that the phrase "any line of commerce" must include the line of commerce in which the person receiving the unlawful discrimination is engaged.

Appellees do not contend that Section 2 does not apply to every line of commerce. What we do contend is that the phrase "any line of commerce," as used in said Section 2, has reference only to the line of commerce *in which the discriminator is engaged*, whatever that commerce may be.

The very phraseology of the Act shows that Section 2 does not apply to discrimination, the effect of which may be to substantially lessen competition or tend to create a monopoly in the line of commerce in which the purchaser from the discriminator is engaged.

(1) Neither the word "any" nor the phrase in which it appears is to be read, as appellant insists that

it be read, as if it stood separate and apart from the rest of Section 2. It is an integral part of said Section and is to be read and construed in the light of the other phrases found therein. *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 392. When so read, it will be apparent that the "line of commerce," competition in which is to be protected and monopoly in which is to be prevented, is and can only be that commerce in which "it shall be unlawful for any person to be engaged in" and "in the course thereof" to make the prohibited discriminations.

Such is the primary and natural meaning of the phrase "any line of commerce" and to construe that phrase as including a line of commerce in which the discriminator does not engage would be a strained construction not required or justified by anything in the Act or in the history of the Act. It is not reasonable to suppose, and Congress did not fear, that any person would go out of his way to create for the benefit of some other person a monopoly or a lessening of competition in a business in which he himself was not engaged.

When Section 2 is applied directly to appellee American Can Company it forbids the American Can Company, which is engaged in commerce in tin cans, in the course of its commerce in tin cans, unlawfully to discriminate in price between the appellee The Van Camp Packing Company, Inc., and appellant or other purchasers of its tin cans, where the effect of such discrimination may be to substantially lessen competi-

tion or to tend to create a monopoly *in commerce in tin cans.* The commerce in which appellee The Van Camp Packing Company, Inc., as well as appellant, is engaged is *the canned goods business,* an entirely different line of commerce. An empty tin can is not a can of beans. The lessening of competition in or monopolizing of the tin can business is not equivalent to lessening competition in or monopolizing the canned goods business. The natural, proximate, and necessary result of the granting of improper price discriminations or the making of tying contracts by a manufacturer of tin cans would be to lessen competition and to create a monopoly in the tin can business; and not in the canned goods business, or the wholesale provision business, or the retail grocery business.

(2) Such is the necessary construction of the same words used in Section 3 of the Act and unless the context compels a different construction, which it does not, the language of Section 3 should be given a like construction.

Briefly stated, the effect of Section 3 of the Clayton Act is to make unlawful a sale or lease, or the fixing of a price or discount upon a sale or lease, upon condition that the purchaser or lessee shall not deal in the goods of competitors of the seller or lessor, where the effect of the transaction "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

It is directed at the so-called "tying contracts," contracts by which the seller or lessor of a commodity,

either by express agreement or discriminatory dealing, compels his customers to refrain from dealing with *his* competitors. It is impossible to conceive of any competition which such conduct would lessen except competition between the seller or lessor and his competitors. Such an arrangement would directly obstruct the free flow of the goods of competitors of the seller or lessor into the normal channels of trade, but it would have no effect upon competition between the purchasers or lessees.

It is also impossible to conceive of any monopoly which such conduct would foster except a monopoly to be enjoyed by the seller or lessor. By preventing the merchandise of competitors of the seller or lessor from finding an outlet through the normal channels of trade, the prohibited dealings would directly tend to create a monopoly of the trade for the seller or lessor, but would not create a monopoly in any purchaser or lessee.

The only conduct prohibited is conduct by the seller or lessor ("the person engaged in commerce") which prevents *his* customers from dealing with *his* competitors. The only monopoly which such prohibited conduct would tend to create is a monopoly by the seller or lessor. The only competition which such conduct would tend to lessen is competition between the seller or lessor and *his* competitors.

Consequently, the word "competition" in the last clause of Section 3 of the Clayton Act can refer only to competition between the seller or lessor whose con-

duct is regulated and his competitors; the word "monopoly" in the same clause can refer only to a monopoly to be enjoyed by the seller or lessor, in the products forming the subject matter of the discriminatory practice.

It must be apparent therefore, that so far as Section 3 is concerned, the phrase "in any line of commerce" does not in any way broaden the effect of the words "competition" or "monopoly" to include competition other than that between the seller or lessor and his competitors, or to include "monopolies" other than a monopoly to be enjoyed by the seller or lessor; because the prohibited acts would have no effect to lessen or produce, respectively, any other competition or monopoly.

So far as Section 3 is concerned it follows that the effect of the phrase "in any line of commerce" is simply to apply the prohibition of the act to all sorts of trade, to make it apply indifferently to the butcher, baker and candlestick maker; and not to prohibit sellers and lessors from making sales or contracts of sale, tending to suppress competition between outsiders not competing with them or tending to create monopolies in other than themselves.

(3) The word "competition" in that clause of Section 2 now in question should be given the same meaning as the same word in the clause "made in good faith to meet competition," and the word in the latter clause clearly refers to competition with competitors of the seller, the person "engaged in commerce," and to no other competition.

It is elementary that identical words in the same Act or section should receive the same construction, unless the context compels the contrary. No context compels the giving of different constructions to the word "competition" in the two different clauses where it occurs in Section 2. The latter clause in which the words appear permits the seller, "the person engaged in commerce," to make price discriminations to meet "competition." The only "competition" which could conceivably be referred to in this clause is competition between the seller "the person engaged in commerce" and his competitors, because this is the only "competition" which could be *met* by a price difference. This meaning of the word "competition" so clearly appearing in one clause should be applied to the same word in the clause now in question, since nothing indicates a contrary meaning.

The only attempt to define competition in Section 2 is contained in the provision that nothing contained in the section shall prevent discrimination in price in the same or different communities made in good faith "to meet competition." Competition here must mean that between the discriminator and his competitors, because the former cannot possibly know what competition will subsequently take place between his customer and the latter's competitors when gooods are sold later, nor could he possibly "meet" any such competition, much less control it.

(4) The word "commerce" is used three times in the first sentence of section 2. In the phrases "engaged

in commerce," and "in the course of such commerce," it plainly refers only to the "line of commerce" engaged in by the "person" whose conduct is regulated. Where the word next appears, in the phrase "in any line of commerce," appellant insists that its use is not so restricted; that it refers as well to lines of commerce in which "the person" regulated is not engaged, and that the phrase "in any line of commerce" was inserted for the purpose of broadening the application of the words "monopoly" and "competition."

In examining this argument, it is noteworthy that the phrase "in any line of commerce" is wholly unnecessary and superfluous, if its purpose is to achieve this result. If the phrase "in any line of commerce," found at the end of the first sentence, had been omitted, the prohibited effect would have been "to substantially lessen competition or to create monopoly." The literal and grammatical interpretation of this language would, without restriction, have been as broad or broader than that for which appellants now contend. The literal interpretation would cover any and all monopolies, whether or not enjoyed by "the person engaged in commerce," would condemn any and all substantial lessening of competition, whether competition with such "person" or between others.

Although, as has been shown, the omission of the phrase "in any line of commerce" would have made the literal application of the act to all monopolies and all lessening of competition, whether or not in the discriminator's "line of commerce," much more clear than

at present, we believe that it may be asserted with confidence that in view of the very remote possibility that discriminatory practices would ever be used to produce monopoly or suppress competition in a line of commerce other than that engaged in by the discriminator, the construction now advocated would scarcely have been suggested, had the phrase been omitted.

We submit, therefore, that it is not proper to infer that the phrase "in any line of commerce" was inserted to extend the application of the words "monopoly" and "competition," since, as above suggested, it was wholly unnecessary for that purpose. The phrase must therefore have been inserted for some other purpose, and such other purpose is not difficult to ascertain.

The word "commerce," in its general signification, covers both inter-state and intra-state commerce. As used in the Clayton Act, however, the term is expressly limited in section 1 of the Act, U. S. C. A. Tit. 15, Sec. 12, to "trade or commerce among the several states," etc., i. e., commerce over which the Constitution vests regulatory power in Congress.

The most obvious effect and therefore the most obvious purpose of the phrase "in any line of *commerce*" is restrictive and not extensive, to confine the operation of the Act to monopoly and lessening of competition resulting to trade in interstate and foreign commerce from the prohibited discriminations in interstate and foreign commerce.

In order to give this phrase meaning, it is therefore wholly unnecessary to ascribe to it the effect

asserted by appellant, an effect which obviously hinders competition in the line of commerce engaged in by the trader whose conduct is in question; a hindrance which appellants seek to impose because of a wholly fortuitous and unsought advantage accruing to persons in other lines of commerce.

(5) It is apparent from the Congressional Journals (hereinafter more particularly referred to) that the creation of monopolies for the benefit of customers of a price discriminator, or the suppression of competition between such customers, was not one of the evils in contemplation upon the passage of the Clayton Act. It is likewise apparent that only a very few, if any, persons engaged in commerce may be expected to grant price discriminations with the purpose of effecting monopoly or suppressing competition for the sole benefit of their customers. Where price discriminations operate through creation of monopoly or suppression of competition among competitors of the discriminator, to create monopoly or suppress competition in the line of commerce where in the discriminator is engaged, an evil result is achieved which the framers of the Clayton Act had reason to fear, and for which they provided a remedy. On the other hand, where a person engaged in commerce, for the legitimate advancement of his own business, without seeking or causing monopoly or suppression of competition in the line of commerce in which he is engaged, makes price discriminations which result in the creation of monopoly or suppression of competition among his customers,

it must be apparent that such interference with commerce, so far as the discriminator is concerned, is wholly fortuitous, and an evil, if it be an evil, which the framers of the Clayton Act had no reason to fear, and no motive to prohibit.

It is also apparent that whatever restrictions are placed upon the freedom of action of "persons engaged in commerce" must tend to some extent to interfere with commerce and restrict that freedom of competition which it is the policy of the anti-trust laws to preserve. When restriction is directed at those acts which selfishly motivated persons engaged in commerce may be expected to commit to create monopolies and suppress competition for their own benefit, its beneficial effect in preserving freedom of competition is understandable. When, however, it is attempted to restrict the otherwise lawful competitive practices of persons engaged in commerce, not because of any tendency to create monopoly or suppress competition for the persons whose conduct is in question, but solely because of a deleterious effect upon competition between others, the fact that deliberate design to achieve such results is not to be anticipated, so that monopoly and suppression of competition thus caused must be of rare occurence, coupled with the very apparent restriction upon the competitive freedom of the person whose conduct is regulated, gives every reason to scrutinize carefully the language sought to be so construed. As was said by this Court in *Federal Trade Commission v. Gratz*, 253 U. S. 421, at page 428,

"If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved."

It is apparent that the construction of the Clayton Act advocated by appellant will impose a very great restriction upon the discretion of appellee Can Company in its choice of business practices; a restriction which will exclude from its choice practices of a highly competitive nature, practices adopted without any illegitimate motive, and practices which are not alleged to result in any illegitimate advantages to it. Such a result is clearly out of harmony with the policy of all the Anti-Trust Laws, as above indicated, and, unless such a construction is an absolutely necessary result of the language used, we submit it should not be adopted.

Therefore we submit that the language of the Act requires the phrase "any line of commerce" to be construed as referring only to the line of commerce in which the discriminator is engaged.

POINT 2.

The Construction of Section 2 of the Clayton Act Suggested by Appellees is in Harmony With the Policy of the Anti-Trust Laws.

Appellant asserts that a negative answer to the questions certified would be wholly at variance with the policy of the other Anti-Trust laws of the United

States. The argument advanced is that both the Sherman Act and the Federal Trade Commission Act safeguard competition among the retailers dealing in the goods of one manufacturer; that in the course of its opinion in *Federal Trade Commission v. Beech-Nut Packing Company*, 257 U. S. 441, 454, the supreme Court denounced a certain course of conduct as restraining

> "the freedom of competition in the channels of interstate trade which it has been the purpose of all the Anti-Trust Acts to maintain"

and that as that opinion was written after the Clayton Act came into effect, the court must have meant that the Clayton Act was one of the Anti-Trust Acts which protected competition among retailers dealing in the goods of one manufacturer.

But not only is appellant relying solely upon a dictum in that opinion of the Supreme Court, but it places thereon a most strained construction. An examination of the entire opinion makes it clear that this Court referred merely to freedom of competition in general as the purpose of all the Anti-Trust Acts; and not simply to competition among retail distributors by reason of retail price fixing, a matter nowhere condemned in the Clayton Act.

Appellant overlooks the fact that the Clayton Act, as shown by its preamble, is supplementary. It was intended to cover not what had previously been covered by the Sherman Act or the Federal Trade Commission

Act, but certain matters which had previously been unprovided for; to stop gaps, not to overlap the entire field theretofore dealt with. As this Court said in *United Shoe Machinery Co. v. United States*, 258 U. S. 451, 460, referring to the case of *Standard Fashion Co. v. Magrane Houston Co.*, 258 U. S. 346.

> "In that case we pointed out that the Clayton Act was intended to supplement the Sherman Act and within its limited sphere established its own rule."

POINT 3.

The Only Reported Decisions Support Appellees' Contention.

During the time the Clayton Act has been in force, some fourteen years, the only reported decisions upon the question here in controversy are from the Circuit Court of Appeals for the Second Circuit; and its decisions, for the review of each of which a writ of certiorari was applied for but denied, each held that the granting of discriminatory prices by a seller to a purchaser, the effect of which may be to restrict competition, not between the seller and its competitors but between the purchaser and its competitors or where the discriminatory prices tend to create a monopoly not in the seller but in the purchaser, does not constitute a violation of Section 2 of the Clayton Act.

The case of *Mennen Company v. Federal Trade Commission*, 288 Fed. 774, arose on a petition by the

Mennen Company to review an order of the Federal Trade Commission requiring said company to desist from certain methods of competition on the ground that they were in violation of Section 2 of the Clayton Act. The Mennen Company had adopted a plan for the allowance of trade discounts in the marketing of its several products such as talcum powder, tooth paste, etc. in pursuance of which plan it classified its customers into two classifications and allowed the members of such groups different discount rates. It was alleged that such discounts were made irrespective of quantity and quality or grade of the commodity sold without regard to difference in cost of selling or transportation, that such discounts were not made in good faith to meet competition; and it was expressly alleged that such practice tended unduly to hinder competition between distributors of the petitioner's products and that the effect of such discrimination might be to substantially lessen competition in the distribution of the Mennen Company's products or betweeen distributors thereof. The Circuit Court of Appeals reversed and set aside the Federal Trade Commission's order on Mennen Company to cease and desist from such practice. *The Court directly held that the record showed not even a contention that the practice complained of lessened competition as between the Mennen Company and its competitors but that at the most the practice decreased competition among its customers or those who desired to become such customers.* The Court pointed out that Section 2 of the Clayton Act in the

form in which it was originally reported out of committee was intended to protect both kinds of competition,—competition between the manufacturer and his competitors on the one hand as well as competition between the customers of the manufacturer on the other, but that the Bill was changed before enactment so as to eliminate that effect; that the reports of the Judiciary Committees and the statements of those in charge of the bill on the floor of either House neither indicate nor suggest the interpretation which the Federal Trade Commission sought to put upon said Act; and, by Rogers, J., said:

> "The Clayton bill, as originally introduced, did not contain the words 'where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce,' now found in section 2, but contained the words 'with the purpose or intent thereby to destroy or wrongfully injure the business of a competitor, of either such purchaser or seller.'
>
> The record filed in this court shows no contention by the Commission that the practices complained of have lessened competition as between Mennen Company and its competitors, but it shows at the most that the practices have decreased competition among the Mennen Company's customers, or those desiring to become such. And it is said that if the phraseology above quoted as originally contained in the bill had been retained therein upon final passage instead of the phraseology, likewise above quoted, which was substituted therefor, there might be just ground for the claim that the Clayton Act prescribes practices which injure competition among the customers of the manufacturer, and

not merely competition between such manufacturer and his competitors. But the elimination of the phraseology contained in the bill as originally reported and the substitution therefor of the phraseology in the form in which the bill was finally enacted strongly indicates that Congress did not have in contemplation the former character of competition but only the latter.

In the phraseology of the bill as originally reported the intention was unmistakably expressed that it was intended to protect by its prohibitions both kinds of competition, competition between the manufacturer and his competitors, as well as competition between customers of the manufacturer. The act as reported prohibited acts 'with the purpose or intent to thereby destroy or wrongfully injure the business of a competitor, of either such purchaser or seller.'

We have recently had occasion to point out that in the case of an ambiguous or obscure statute the intent of Congress may be gathered from statements in reports of committees having the legislation in charge in either House of Congress. *U. S. ex rel. Fazio v. Tod* (C. C. A.), 285 Fed. 847, decided November 13, 1922. And statements made on the floor of either House by the committee in charge of the bill in the course of its passage may in like manner be considered. See *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 475, 41 Sup. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196.

It is a matter of common knowledge that prior to the enactment of the Clayton Act a practice had prevailed among large corporations of lowering the prices asked for their products in a particular locality in which their competitors were operating for the purpose of driving a rival out of business. Such lowering of prices was maintained within the particular locality

while the normal or higher prices were maintained in the rest of the country; and this practice was continued until the small rival was driven out of business, whereupon the prices in that locality would be put back to the normal level maintained in the rest of the country. The Clayton Act was aimed at that evil. This appears from the Report of the Judiciary Committee of the House of Representatives from which we quote as follows:

> 'Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country. * * *
>
> 'The necessity for legislation to prevent unfair discriminations in prices with a view of destroying competition needs little argument to sustain the wisdom of it. In the past it has been a most common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Company, the American Tobacco Company, and others of less notoriety, but of great influences—to lower prices of their commodities, oftentimes below the cost of production in

> certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. * * *
>
> 'In seeking to enact section 2 into law we are not dealing with an imaginary evil or against ancient practices long since abandoned, but are attempting to deal with a real, existing, widespread, unfair and unjust trade practice that ought at once to be prohibited in so far as it is within the power of Congress to deal with the subject.'

There is nothing in the Report of the Committee which shows that in reporting the bill the Committee had in mind anything more than the suppression of the evil above referred to.

This substitution in the final stages of the Clayton Bill of the clause to which we have referred plainly indicates the intent of Congress to exclude from the operation of the section mere competition among 'purchasers' from the 'seller' or 'person' who allowed or withheld the discount and to include therein only competition between such 'seller' or 'person' and the latter's own competitors. It was the latter class of competition and not the former which had been 'the common practice of great and powerful combinations engaged in commerce' to which the Committee in its report referred. And there is nothing in the report of the Judiciary Committee, of either House, or in anything said on the floor of either House by those in charge of the bill, which indicates or suggests any such interpretation which the Commission in this case has placed upon the act."

The Supreme Court denied a petition for writ of certiorari to review that decision: 262 U. S. 759.

A later decision of identical effect by the same Court (Judge Hough participating in lieu of Judge Rogers) is *National Biscuit Co. v. Federal Trade Commission*, 299 Fed. 733. A writ of certiorari to review that decision was denied: 266 U. S. 273.

What that Court said with respect to the proper construction of Section 2 of the Clayton Act is not pure obiter dictum, as appellant argues, but is a judicial declaration upon a question directly presented in the litigation.

Appellant attacks the Mennen case as unsound in failing to point out any ambiguity in Section 2 of the Clayton Act so as to justify a resort to the legislative history of the Act. But the words "monopoly" and "competition" in Section 3 of the Clayton Act being limited in their application by the very necessities of the situation to that monopoly which is to be enjoyed by or that competition which is with the seller or lessor whose conduct is regulated, when the Federal Trade Commission came into court in the Mennen case suggesting that the identical language of Section 2 should be more broadly construed to include competition between purchasers from the seller (manufacturer) whose conduct is regulated, as well as competition between him and his competitors, and to include monoply to be enjoyed by purchasers from such a seller, there immediately arose the question whether

identical language in two sections of the same Act should be given a difference in meaning: a clear suggestion of ambiguity. If the Circuit Court of Appeals for the Second Circuit had considered that no such ambiguity existed it must at once have decided the question adversely to the Trade Commission, since the phrase "lessen competition or tend to create monopoly in any line of commerce" cannot possibly have the broad application in Section 3 which appellant in this case and the Trade Commission in the Mennen case sought to ascribe to the identical language of Section 2. Instead of thus summarily passing upon the contention of the Trade Commission, the Court very properly took into consideration the Journals of Congress to determine whether that contention had any basis whatever; and correctly arrived at its decision.

Appellant asserts that the decision in the Mennen case is valueless as a precedent because of the court's misapprehension of the history of the Clayton Act.

Section 2 of the Clayton Bill, as reported from committee, contained the phrase:

> "with the purpose or intent thereby to destroy or wrongfully injure the business of a competitor of either such purchaser or seller,"

for which there was substituted in the Bill as enacted, the following:

> "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The action of Congress in deliberately eliminating the former phrase from the Bill as enacted must be taken as its distinct refusal to extend the prohibition of that section to competition between purchasers from the discriminator, unless the expression "any line of commerce" can fairly be construed to include competition between purchasers from the discriminator.

In an effort to show that the eliminated phrase is synonymous with or rather is included in the substituted phrase, appellant really relies upon a statement made by congressmen during consideration of the Bill by the House, to the effect that the new language gave that section more breadth and elasticity.

A comparison between Section 2 in its entirety as reported from committee and as finally enacted, discloses that the section as reported, prohibited price discriminations when done with intent to injure; but as enacted, prohibited price discriminations regardless of intent when tending to create monopoly or to lessen competition. In other words, the Bill, as reported, did not apply to discriminations when the intent to injure was absent, but as enacted it applied to all acts having the prohibited tendency to lessen competition or monopolize, whether the intent to injure was present or absent. The Bill, as enacted, thus applied the prohibition to cases to which the Bill as reported did not apply, so that the application of the Act was broadened, irrespective of what construction is to be given to the words, "any line of commerce." Therefore the words of Congressman Webb were justified and are

explained without the necessity of extending the meaning of the phrase "in any line of commerce" to include not alone the commerce in which the discriminator is engaged, but the commerce in which the purchasers from the discriminator are engaged.

This conclusion finds support in the congressional debates. It does not appear that the question of restraint of competition among purchasers from the seller was discussed by the Conference Committee. In fact, in all the discussions in both House and Senate, there is no intimation that the purpose of the Act was to protect competition among purchasers from the seller, or in any other business than that in which the discriminator was engaged. The discussions and debate show that the language in which Section 2 was originally cast was felt to be restrictive, not in the scope of the subject-matter covered (as appellant would have it believed), but merely because of the difficulty of proof in litigation. It was supposed that if it were necessary to prove "intent and purpose" as in an ordinary criminal action, the burden on the Government or upon an individual complaining would be too much; and that an easier standard in proving violations of the Act would be afforded by simply prohibiting discriminations, *the effect* of which might be substantially to lessen competition or tend to create a monopoly.

The fact that the committee's report consulted by the court was made before the language under discussion became a part of the Act, stressed by counsel for

appellant as an element of weakness in the court's reasoning, is rather an element of strength. The significance of the argument is that Congress considered a committee report pointing out as evils resulting from predatory price cutting, the suppression of competition by competitors of the price cutter, and the creation of monopolies in the price cutters (not mentioning as evils the suppression of competition between purchasers from the price cutter or the creation of monopolies in such purchasers), and suggesting as a test of illegality an *intent to injure* the business of competitors of either purchaser or seller; and yet, while enacting a law presumably to remedy the evils mentioned by the committee, Congress saw fit to eliminate intent to injure business as a test, and substituted a provision setting up as the test of illegality the tendency to lessen competition or to create monopoly, i. e., the competition *between sellers* and the *monopoly by sellers* which alone were pointed out as *lessened* and *created* by the existing practices.

The point of the argument is that the bill was changed before it became a law, changed in the only feature affording any basis for the construction advanced by plaintiffs in this case, changed by language which makes it strike *directly* at lessening competition and at monopoly instead of *indirectly* by denouncing price cutting with intent to injure. When, therefore, the word "competition" in the final draft is compared with the same word as used in the report, it must be apparent that it means, as the court con-

cluded, *competition between the price cutting seller and his competitors, not competition between purchasers of his commodities*, because, as the court aptly observed:

> "It was the latter class of competition and not the former which had been the common practice of great and powerful combinations engaged in 'commerce' to which the committee in its report referred."

Respectfully submitted,

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September 24, 1928.

APPENDIX.

Pertinent Provisions of Clayton Act.

Section 2 of the Clayton Act, (U. S. Code, Title 15, Section 13), reads as follows:

> *"Price discrimination between purchasers to lessen competition or create monopoly.*—It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

Section 3 of the Clayton Act, (U. S. Code, Title 15, Section 14), reads as follows:

> *"Sales made or prices fixed on agreement not to use competitor's goods where effect is to lessen*

competition or create monopoly.—It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof, or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 16 of the Clayton Act, (U. S. Code, Title 15, Section 16), reads as follows:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and showing that the danger of irreparable loss or dam-

age is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."